

EMPLOYMENT

Quotas for employment of foreign nationals – Rationing the work

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Quotas for employment of foreign nationals

by Peter Mosebo, Director and Lisa Appelgryn, Senior Associate

1. The Minister of Employment and Labour published the draft National Labour Migration Policy ("**Policy**") and Employment Services Amendment Bill ("**Bill**") on 28 February 2022 for public comment for a period of 90 days, whereafter it will be tabled in parliament. The Bill is intended to regulate the employment of foreign nationals in South Africa.
2. The Bill seeks to give effect to the Policy. The Bill proposes to repeal Sections 8 and 9 of the Employment Services Act No. 4 of 2014 ("**Act**") in their entirety and insert chapter 3A (comprising Sections 12A to 12E) in its stead.
3. Chapter 3A, Section 12A(2) in particular, places a duty on employers to –
 - 3.1 establish that the foreign national is entitled to work in South Africa and to perform the work they are employed to do;
 - 3.2 make certain, before filling a vacancy, that there are no persons in South Africa, other than foreign nationals, with the requisite skills to do the work;
 - 3.3 prepare a skills transfer plan for positions in which foreign nationals are employed;
 - 3.4 employ foreign nationals on terms and conditions of employment that are not inferior to those of South Africans, permanent residents and refugees; and
 - 3.5 retain copies of all documents reflecting that the foreign national is lawfully entitled to be employed in South Africa.
4. Section 12B introduces quotas for the employment of foreign nationals. The quotas will be introduced by the Minister by way of a Government Gazette Notice. The Notice(s) may apply nationally or be sector/region/occupationally specific. The Notice(s) will specify the period within which existing and newly established employers must comply with the quotas, however, provision is made for the exclusion of small employers (as will be defined in the notice).
5. An employer will be exempted from a quota if it has employed a foreign national in a critical skills position. In all other instances, an employer may apply to the Minister for an exemption from an applicable quota.
6. In our view, the Bill seeks to enhance job opportunities for South African citizens by restricting the employment of foreign nationals to only those who are legally permitted to work in South Africa and it penalises employers who contravene the Bill.
7. Further, the requirement to employ foreign nationals on terms and conditions of employment not inferior to those of South Africans, permanent residents and refugees, will protect foreign nationals from exploitation while also addressing the complaints by South Africans (which continue to spark protests and violence) that the already scarce jobs are given to foreign nationals because employers can easily exploit them.

8. Employers who employ foreign nationals are encouraged to comment on the bill before it is tabled in parliament and passed into law. Once passed into law, a failure to comply with chapter 3A may attract a fine not exceeding R 100 000.

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Lisa Appelgryn

Director

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Peter Mosebo